DEC 31 1969

IN THE

Supreme Court of the United States

October Term, 1969
No. 74

CLIFFORD TAGGART, *et al.*,

Petitioners,

vs.

WEINACKER'S, INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

Motion of Homart Development Co. for Leave to File a Brief as Amicus Curiae and Brief of Homart Development Co. as Amicus Curiae.

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Comes now Homart Development Co. (hereinafter called "Homart") by its attorney, Allen B. Gresham, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae* in the instant case in support of the position of the Respondent for the following reasons:

1. Homart is a Delaware corporation and is engaged in the ownership and operation of eight shopping centers throughout the United States. Homart is one of the respondents in a proceeding before the California Fourth District Court of Appeal (hereinafter referred to as the "California case")[1] which involves

[1] *Diamond, et al. v. Bland, et al.*, 4th Civ. No. 10084. The parties have jointly sought to expedite the proceeding in order to obtain a final determination by the California courts at the

(This footnote is continued on the next page)

issues related to but nevertheless distinct from those raised in the instant case. The interest of the *amicus* is that the Court should be aware of the pendency of that proceeding and not dispose of the different questions there involved. Alternatively, should the Court desire to determine such matters, Homart's concern is that the Court should be aware of the dimensions of such issues and its position with respect thereto.

2. Homart's concern is underscored by a series of generalizations and over-extensions of this Court's decision in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, engaged in by the AFL-CIO in its *amicus* brief filed herein. Acceptance of such arguments could well be dispositive of the California case adverse to Homart's interest. If permission to file an *amicus* brief is granted, Homart will briefly describe the errors contained in such arguments and the

earliest possible date. Thus, the critical event—Homart's request (under threat of arrest pursuant to a San Bernardino shopping center no-trespass ordinance) that plaintiffs cease from engaging in the solicitation of signatures on an environmental pollution initiative petition on both the common aisleways of the interior mall area and the exterior adjacent sidewalks of its shopping center, occurred on October 30, 1969. Plaintiffs' complaint, seeking a preliminary and permanent injunction to preclude such alleged interference with their Constitutional rights, was filed on November 5 and was denied, after a full hearing, by the Superior Court of San Bernardino County on November 14. An appeal was filed in the District Court of Appeal three days later and on December 10, a joint petition was made to the California Supreme Court that it transfer the case to itself for hearing and decision. This petition was denied by the court on December 12 and a request for reconsideration, supported by *amicus* statements of the American Civil Liberties Union, the California Retail Association and counsel for another large group of retailers, was also denied on December 17. The parties have subsequently agreed to submit their briefs to the Court of Appeals before the end of the year and to jointly petition that court to conduct oral argument and determine the case as soon thereafter as possible.

potentially substantial and far-reaching consequences thereof.

3. Consent to Homart's filing a brief as *amicus curiae* was sought pursuant to Rule 42 of this Court. By telephone advice of December 19, 1969, counsel for Petitioners declined to grant such consent.

4. If leave is granted to file a brief as *amicus curiae*, Homart will seek only to discuss those matters which affect its vital interests and the brief will otherwise be short and relevant so that the Court's time will not be misspent.

Respectfully submitted,

ALLEN B. GRESHAM,
LONERGAN, JORDAN & GRESHAM,
Attorney for Homart Development Co.

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Brief of Homart Development Co. as Amicus Curiae.

Interest of the Amicus Curiae.

Homart Development Co. (hereinafter referred to as "Homart") is a Delaware corporation engaged in the ownership and operation of eight shopping centers throughout the United States. Homart is one of the respondents in a proceeding before the California District Court (hereinafter referred to as the "California case")[1] which involves issues related to but

[1] *Diamond, et al. v. Bland, et al.*, 4th Civ., No. 10084. The parties have jointly sought to expedite the proceeding in order to obtain a final determinaton by the California courts at the earliest possible date. Thus, the critical event—Homart's request (under threat of arrest pursuant to a San Bernardino shopping center no-trespass ordinance) that plaintiffs cease from engaging in the solicitation of signatures on an environmental pollution initiative.

(This footnote is continued on the next page)

nevertheless distinct from those raised in the instant case. The interest of the *amicus* is that the Court should be aware of the pendency of that proceeding and not dispose of the different questions there involved. Alternatively, should the Court desire to determine such matters, Homart's concern is that the Court should be aware of the dimensions of such issues and its position with respect thereto.

petition on both the common aisleways of the interior mall area and the exterior adjacent sidewalks of its shopping center—occurred on October 30, 1969. Plaintiffs' complaint, seeking a preliminary and permanent injunction to preclude such alleged interference with their Constitutional rights, was filed on November 5 and was denied, after a full hearing, by the Superior Court of San Bernardino County on November 14. An appeal was filed in the District Court of Appeal three days later and on December 10, a joint petition was made to the California Supreme Court that it transfer the case to itself for hearing and decision. This petition was denied by the court on December 12 and a request for reconsideration, supported by *amicus* statements of the American Civil Liberties Union, the California Retail Association and counsel for another large group of retailers, was also denied on December 17. The parties have subsequently agreed to submit their briefs to the Court of Appeals before the end of the year and to jointly petition that court to conduct oral argument and determine the case as soon thereafter as possible.

ARGUMENT.

The California case, just as the instant case, requires a resolution of various questions left unanswered in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308. Both cases thus involve the conflict between the First Amendment rights of those who wish to utilize the private property of another to communicate a message and the Fifth Amendment rights of the property owner who opposes such a use. The nature of the issues involved, however, is quite separate and distinct.

The questions raised by the present case concern the ramifications resulting from the substantial physical distinctions between the small, single retail store here involved and the significantly larger shopping center of *Logan Valley*: for example, whether the interference occasioned by picketing or other forms of expression in a small, congested area, or the availability in such a situation of other effective and readily accessible alternative channels of communication, is a sufficient basis for protecting the business interests involved.

Conversely, the California case is one where the salient differences from *Logan Valley* do not concern the physical nature of the situs: the particular shopping center there involved, the Inland Center in San Bernardino, is a large regional center which closely resembles in appearance and function that of *Logan Valley*. Rather, in contrast to the union organizational picketing involved in *Logan Valley*, the objective of the communication in the California case is the solicitation of signatures by a non-labor group on an environmental pollution initiative petition admittedly un-

related in purpose to Homart or any of the co-owners or tenants of the Center. Another critical distinction involves one of the locations chosen by the plaintiffs to accomplish their objective in the California case: the common aisleways of an enclosed, air-conditioned, well-maintained interior mall. Finally, the cases also differ, in view of the dissimilar purpose of the use sought in the California case from that in *Logan Valley*, in the wide variety of alternative forums for reaching the desired audience available in the former case.

The California case thus raises the question, specifically not resolved in *Logan Valley*, of whether a shopping center owner's "property rights could, consistently with the First Amendment, justify a bar on [communication] which was not thus directly related, in its purpose to use to which the shopping center property was being put" (391 U.S. at fn. 9).[2] It poses the issue of whether the alternative, effective means of dissemination available where such a nexus is absent similarly may warrant a reasonable regulation of the asserted free speech rights involved.[3] And it also involves the question of whether, because of the increased obstruction and interference occasioned by the plain-

[2] *Cf. Peace v. Miles*, 407 F. 2d 73 (2nd Cir., 1968) (holding that students could be prohibited from demonstrating at the football stadium of a university on the basis that the stadium was not a traditional place of public protest and that the protestors had "ample chance to make their point" at other places on the campus); and *Adderley v. Florida*, 385 U.S. 39 ("the State, no less than the private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated").

[3] *Cf. NLRB v. Babcock & Wilcox*, 351 U.S. 105

tiffs' utilization of the common aisleways of an enclosed mall to communicate their message, Homart may properly invoke the proscription of *Logan Valley* that "the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it" (391 U.S. at 20-1). None of these potentially substantial and far-reaching matters are involved in the instant case.

In view of this separate nature of the fundamental questions involved, Homart believes that the present controversy should be decided on its own facts and in such a manner as not to be dispositive of the broader and different issues of the California case. Such a limited decision would be in accord with the principle that this Court only deals "with concrete and specific issues raised by actual cases . . . not with . . . theoretical disputes" (*Allen Bradley Local 1111, United Electrical Workers v. NLRB*, 315 U.S. 740, 746) and that "courts deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances" (*Associated Press v. NLRB*, 301 U.S. 103, 132).

The *amicus* brief submitted in the instant case by the AFL-CIO disregards these precepts. It seeks instead to have here adjudicated a host of asserted wide-ranging theories not relevant to a resolution of the present controversy, but which would directly govern the California case. For example:

1. The AFL-CIO argues that a property owner has no right *whatsoever* to "shut off communication whose message is abhorrent to him" and that "where First Amendment rights are at stake common law property concepts . . . have no legitimate role to play" (AFL-CIO Br., p. 10). These sweeping generalizations blatantly ignore the numerous references to permissible regulation of First Amendment rights, by reason of the "legitimate role" of "common law property concepts", contained in *Logan Valley*; for example, that even public property "may be regulated so as to prevent interference with the use of which the property is ordinarily put by the State" (391 U.S. at 320); that the result in *Logan Valley* was founded on the absence of any showing there that the picketing sought "was significantly interfering with the use to which the mall property was being put by both respondents and the general public" (391 U.S. at 323); or, as differently stated elsewhere in the decision, that its *sine qua non* was the Logan Valley Center owner's inability to raise "any significant claim to protection of the normal business operation of [his] property" (391 U.S. at 324). It grossly misstates the law, as well as the logic, which must be controlling in the present case to urge upon the Court any blanket talisman as the panacea for the delicate balance to be struck between Constitutional rights in the sensitive area here involved, a balance "which must be obtained with as little destruction of one [right] as is consistent with the maintenance of the other [right]".[4]

[4] *Id.* at 112.

2. The AFL-CIO further argues that the Constitutional rights here at issue cannot be measured by "the metes and bounds of the site" (AFL-CIO Br., p. 17). Yet, on the other hand, it acknowledges that there is no absolute right to picket or pamphleteer inside a store or in "an area devoted to selling or [in] one in which there is a true interest in privacy" (*Id.* at 14).[5] Surely, the only justification for regulating the use sought in such situations must be the "metes and bounds" of the situs involved, i.e., that regulation of communication is permissible to the extent that the area chosen therefor creates an unreasonable hardship on the property owner and other members of the public and improperly disregards less onerous available alternatives. The same reasoning is also clearly applicable where the picket does not actually introduce inside the store or selling area but chooses instead a site where his presence has a similar obstructive effect—as, for example, the enclosed exterior mall of the California case or, perhaps, the exterior of the small Weingarten store involved in the instant case.

3. The AFL-CIO indulges in another unwarranted over extension of *Logan Valley* when it asserts that "the permissible range of regulation does not include the power to create" a "'sanctuary' from which some members of the public may be excluded merely because of the ideas they es-

[5] See also the emphasis placed by *Logan Valley* on the site there chosen by the plaintiffs, a location found to constitute the only effective channel of communication (apart from the interior of the store) available to reach the desired audience. 391 U.S. at 322-3.

pouse" (AFL-CIO Br., p. 15). *Logan Valley*, as previously noted, emphasized that the use there sought was "for a purpose generally consonant with the use to which the property is actually put" (391 U.S. at 319-20) or, in the words of the concurring opinion, for a purpose "directly related to that shopping center business" (391 U.S. at 326). The decision clearly did not intend, nor has any other decision of this Court so intended, to create a license on the part of any one segment of the public to utilize the private "sanctuaries" of another to espouse *any* ideas they may desire. Such a law would manifestly deprive the owners of such property of a portion thereof without due process of law or just compensation. It would, in short, seriously endanger the Constitutional basis on which private ownership of property rests in the United States.

This Court is not required to decide the merits of generalizations such as those described above in order to determine the instant controversy. The decision instead should be based solely on the particular facts here involved, including the findings of the Alabama courts, based on their knowledge of local feelings and responsibilities, as to the interference and potential disruption of the domestic peace which was occasioned by the plaintiffs' conduct.

Conclusion.

Decision in the present case should be limited to the particular factual situation involved. It should not resolve the different issues of picketing for a non-related purpose and picketing on an enclosed mall which are involved in the California case but not before the Court here. If the Court should, nevertheless, desire to pass on these issues, it is submitted that all parties would benefit by delaying a decision herein until the California case has been finally determined by the Courts of the State.*

Respectfully submitted,

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*This Court has granted similar requests in the past, as the